No. 04-396

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

CAREMARK RX, INC.
(FORMERLY MEDPARTNERS, INC.),

Petitioner,

v.

J. BROOKE JOHNSTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT JOHNSTON'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the purported "double-counting" federal due process issue was adequately presented below when Petitioner Caremark first mentioned this issue in its application for rehearing in the Supreme Court of Alabama.

2. Whether the purported "double-counting" issue presents a substantial federal due process issue, e.g., when the state courts have decided that the compensatory damages for fraud are a separate and distinct category of compensatory damages that do not duplicate the breach of contract damages.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondent Johnston states the following:

1. Caremark Rx, Inc. (formerly known as MedPartners, Inc.), has no parent company, and no publicly held company owns 10% or more of its stock.

2. At the time the events relevant to this lawsuit occurred (e.g., 1998), the corporation's name was "MedPartners, Inc." To be consistent with the names used in the Petition, this brief will use only the name "Caremark," even though the corporation was known as MedPartners at the time the particular events being discussed actually occurred.

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STATEMENT OF THE CASE

A. Facts Material to the Question Presented

Rule 15.2 of the Rules of this Court requires that "any perceived misstatement of fact" be addressed in respondent's brief in opposition. Respondent Johnston does object to certain allegations of "fact" contained in the Petition, at pp. 2-4.

Page 3, beginning of last paragraph, argues that Johnston's fraud claim was based upon his oral conversation "with one member of Caremark's board." Johnston's conversation was actually with Caremark's acting CEO, the now-notorious Richard Scrushy.[1] Caremark's Appellant's Brief, filed in the Alabama Supreme Court on December 19, 2002, admits, at pp. 28-29, that the Johnston-Scrushy conversation took place on January 16, 1998, and that, as of January 16, 1998, Richard Scrushy was Caremark's acting CEO.

The jury verdict (App. G) and judgment (App. F) awarded Johnston compensatory damages for breach of contract in the amount of $2,262,672.75, including prejudgment interest. Also awarded were $1 million in compensatory damages for fraud and $1 million in punitive damages for fraud. *Id.* At the middle of p. 3 of the Petition, Caremark argues that the facts proved that the compensatory damages for fraud were identical to the breach of contract damages. Thus, at the bottom of p. 3, the Petition

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[1] See, as examples, Press Release, *SEC Charges HealthSouth Corp. CEO Richard Scrushy With $1.4 Billion Accounting Fraud*, www.sec.gov/news/press/2003-04.htm and *Scrushy Indicted on 85 Counts: Former HealthSouth Chief Added Roughly $2.7 Billion in Fictitious Earnings, Alleges the Department of Justice*, www.cfo.com/article.cfm/3010823.

argues that the $1 million of compensatory damages for fraud were really "entirely punitive in nature."

Johnston disputes this allegation of "fact" and the legal argument drawn therefrom. Johnston never testified that his fraud damages were the same as his contract damages. The breach of contract damages were mostly a mathematical calculation from the terms of the employment contract (that is, the "purpose" for the severance payments is legally irrelevant). The compensatory fraud damages were for a completely different injury: Johnston's reliance damages incurred by staying with Caremark and foregoing returning to his former law firm, resulting in Johnston having to start from scratch to build back his own individual law practice.

Caremark never – prior to its May 28, 2004, Application for Rehearing in the Alabama Supreme Court – argued that the compensatory fraud damages duplicated the breach of contract damages. This argument was obviously available to Caremark at the trial court stage of litigation, notwithstanding the fact of what appellate cases had not yet been decided.

The jury and the trial court determined that the compensatory fraud damages did exist and were not cumulative to the damages already awarded for breach of contract. Caremark is seeking to make this Court into a thirteenth juror to re-try the facts of the case. As argument, Johnston points out that "[t]he Supreme Court ordinarily does not sit to decide questions of fact." 20 Charles Alan Wright and Mary Kay Kane, Federal Practice and Procedure Deskbook §115, p. 1083 (2002). "On review of decisions of state courts, the stated rule is that 'all those matters which are usually termed issues of fact

are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observation of this restriction in our review of State courts calls for the utmost scruple.'" *Id.*, quoting *Wolfe v. North Carolina*, 364 U.S. 177, 196 (1960).

Page 4 of the Petition boldly asserts that "Johnston presented no evidence that he suffered actual loss as a result of this alleged fraud." Johnston obviously hotly disputes this statement. The jury, the trial court, and the Alabama Supreme Court all found that legally sufficient evidence of damages had been presented. Fraud damages are discussed at pp. 42-50, 60, of Johnston's January 23, 2003, Appellee's Brief in the Alabama Supreme Court. Also at p. 4 of the Petition, Caremark repeats its arguments from previous briefs about what Johnston did not prove (e.g., his income). As pointed out at pp. 50-54 of his January 23, 2003, Appellee's Brief, Alabama follows the general rule that post-termination earnings are a matter of mitigation, so the burden of proof on that issue is on the defending party, Caremark.

B. How the Federal Question was Raised

The issue (see p. i of Petition) is whether the $1 million of punitive damages is an unconstitutional "double-counting" because the underlying compensatory damages are themselves punitive in nature (according to Caremark). Caremark admits (Petition at p. 5, line 13) that the first time it made this argument was in its Application for Rehearing to the Alabama Supreme Court, filed on May 28, 2004, after that Court had affirmed the judgment. As argued below, this comes too late to preserve that issue for review.

In its Appellant's Brief of December 19, 2002, to the Alabama Supreme Court, Caremark did not argue that the amount of punitive damages was unconstitutionally excessive. There was no argument based upon the ratio between punitive and compensatory damages. No due process argument of any sort was asserted.

REASONS FOR DENYING THE PETITION

I. THE ISSUE PRESENTED BY CAREMARK WAS NOT PRESERVED FOR REVIEW BECAUSE IT WAS FIRST RAISED IN ITS APPLICATION FOR REHEARING IN THE STATE SUPREME COURT.

Alabama follows the general rule that arguments or issues cannot be raised for the first time in an application for rehearing. See *SouthTrust Bank v. Copeland One, L.L.C.*, ___ So.2d ___, No. 1020727, 2003 WL 22064062, * 5 (Ala. Sept. 5, 2003) (Application for Rehearing Overruled March 12, 2004):

> Matters not argued in an appellant's brief on original submission cannot be raised for the first time on application for rehearing. As this Court recently recapitulated this rule: "[Respondent] raises [this argument] for the first time in its application for rehearing. . . . 'We can not sanction the practice of bringing up new questions for the first time, in an ex parte application for rehearing.' *Robinson v. Allison*, 97 Ala. 596, 604, 12 So. 604 (1893) (on application for rehearing). 'We cannot sanction the practice of bringing up new questions for the first time in application for rehearing.' *Kirkland v. Kirkland*, 281 Ala. 42, 49, 198 So.2d 771, 777 (1967) (on application for

> rehearing). 'We cannot sanction the practice of bringing up new questions for the first time in applications for rehearing.' *Cole v. Cole Tomato Sales, Inc.*, 293 Ala. 731, 735, 310 So.2d 210, 212 (1975) (on application for rehearing). 'New supporting arguments presented for the first time on rehearing generally will not be considered.' *Stover v. Alabama Farm Bureau Ins. Co.*, 467 So.2d 251, 253 (Ala.1985) (on application for rehearing). '[T]his argument was raised for the first time on application for rehearing, and therefore will not be considered.' *Schulte v. Smith*, 708 So.2d 138, 141 n. 2 (Ala.1997) (on application for rehearing)." *Ex parte Lovejoy*, 790 So.2d 933, 938-39 (Ala.2000).

See also *Water Works and Sewer Bd. of the City of Selma v. Randolph*, 833 So.2d 604, 608 (Ala. 2002): "The well-settled rule of this Court precludes consideration of arguments made for the first time on rehearing." *Alabama Power Co. v. Cantrell*, 507 So.2d 1295, 1304-05 (Ala.1986), appeal dismissed by *Alabama Power Co. v. Cantrell*, 486 U.S. 1028 (1988), held that a federal due process attack on the $1 million punitive damages award could not be made for the first time in an application for rehearing.

The phrases "drawn in question" and "specially set up or claimed under the constitution," in 28 U.S.C. §1257(a) "mean that the federal question must have been duly raised in the state court." 12 James William Moore, Helen I. Bendix, and Brett A. Ringle, Moore's Federal Practice ¶510.01, 8-56 (2d ed. 1993). "In reviewing the judgments of state courts . . . the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). "[I]t is our practice, when reviewing decisions

by state courts, not to decide federal claims that were not 'pressed or passed upon' below." *Clark v. Jeter*, 486 U.S. 456, 458 (1988). There is "a weighty presumption against review" of claims not pressed below. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). The reasons for this strict rule include: (1) presentation of the federal issue to the state court helps ensure that an adequate record is made; (2) it gives due regard to appropriate relations between the Supreme Court and state courts; and (3) it gives the state court a chance to rely on state grounds. *Illinois v. Gates*, 462 U.S. 213, 221-22 (1983). Also, a reasoned state court opinion on the issue may obviate the need for plenary consideration by the Supreme Court. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

At minimum, "there should be no doubt from the record that a claim under a federal statute on the Federal Constitution was presented in the state courts and that those courts were apprised of the nature of substance of the federal claim *at the time and in the manner required by state law.*" *Id.* (emphasis added). Alabama appellate courts will not consider issues raised for the first time on appeal. This Court recognized this principle in the Alabama case of *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983), where it was said that this Court had "no jurisdiction" to consider an argument made for the first time to the Alabama Supreme Court. "The general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." *Id.* Also, when the state Supreme Court does not discuss the federal issue [as in this case], it is assumed that the omission was because the issue was not procedurally raised in a timely or proper

manner. The aggrieved party has the burden of showing the contrary." *Id.*[2]

Board of Directors of Rotary International v. Rotary Club of Durate, 481 U.S. 537, 549 (1987), refused to review a constitutional question which was first clearly raised in the state supreme court application for rehearing. The state court denied the application without opinion [like in this case], and this Court assumed that action was based upon the failure to timely present the issue. See also *Prudential Federal Savings & Loan Association v. Flanigan*, 478 U.S. 1311 (1986) (rehearing too late). "The long-established general rule is that an initial attempt to raise a federal question after judgment by the highest court, upon a petition for rehearing, comes too late, unless that court actually entertains the question and decides it." Moore's, *supra*, at p. 8-61.

Adams v. Robertson, 520 U.S. 83, 85 (1997), dismissed the writ as improvidently granted because "[t]he Alabama Supreme Court did not address this federal issue, and it is now apparent that petitioners have failed to establish that they properly presented the issue to that court." At 89-90, this Court explained: "Petitioners also note that they

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[2] See *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997): "As petitioners concede" here, the Alabama Supreme Court did not expressly address the question [presented]. Nor have petitioners met their burden of showing that the issue was properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, [citations omitted] and the aggrieved party bears the burden of defeating this assumption. . . ." See also *Street v. New York*, 394 U.S. 576, 582 (1969) ("Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.").

raised their federal due process claim in their petition for rehearing before the Alabama Supreme Court. . . . [W]e have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question. Petitioners having thus failed to carry their burden of showing that the claim they raise here was properly presented to the Alabama Supreme Court, we will not reach the question presented." (internal citation omitted).[3]

"The federal question must have been raised in a proper and timely manner in the state courts." 20 Charles Alan Wright and Mary Kay Kane, Federal Practice and Procedure Deskbook §114, p. 1062 (2002). "The timeliness with which the federal question is raised in the state court is critical. This is largely a matter for the state to regulate by its own procedural rules. Failure to raise the question at the stage of the proceedings required by state law will preclude review. . . . *It is too late to raise a federal question by petition for rehearing to the state appellate court*, except when the decision *of that court* has given rise unexpectantly to a federal question that the party seeking review has had no previous opportunity to assert and could not fairly have anticipated." *Id.* at 1063-64. (emphasis added).

In this case, Caremark did not timely present its federal issue to the Alabama Supreme Court, and that Court did not pass on the federal issue. Caremark's failure

[3] At 87 n. 1, *Adams* also noted that the federal due process issue was [as in our case] *not* included in the statement of the issues section of appellant's brief, and, under Alabama law, that is another procedural waiver to the later attempt to raise a new issue in an application for rehearing.

to properly raise the issue below precludes review by this Court.

It does Caremark no good to point out that *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), was not decided until April 7, 2003, over three months after Caremark filed its Appellant's Brief in the Alabama Supreme Court. First, the *Campbell* case was argued prior to Caremark's Appellant's Brief being filed. All the *Campbell* briefs had already been filed, so the "double-counting" argument was already out there in the public domain prior to Caremark's filing of its Appellant's Brief.

Second, Caremark made absolutely no attempt to bring the *Campbell* opinion and the "double-counting" issue to the attention of the Alabama Supreme Court (until after the Court ruled against Caremark). The Alabama Supreme Court affirmance occurred on May 14, 2004. Caremark had over 13 months to argue *Campbell* and "double-counting" to the Alabama Supreme Court, via a supplemental brief, or otherwise. Instead, Caremark elected to wait and see whether the Alabama Supreme Court would rule in its favor. It is a form of unfair "sandbagging" for Caremark to raise the "double-counting" argument only after it loses its appeal.

The Alabama Supreme Court will permit supplemental briefs when material new case law is released during the pendency of an appeal. Examples include *Ex parte Clarke*, 728 So.2d 135, 140 n. 1 (Ala. 1998) ("After this Court released its opinion in *Nilsen*, Allstate filed in this present case a motion for leave to file an additional brief discussing *Nilsen*, and it conditionally filed the brief. The Court has granted that motion. . . ."); *Ex parte Masonite Corp.*, 681 So.2d 1068, 1079 (Ala. 1996) (Maddox, J., concurring

in the result in part and dissenting in part) ("While this petition was pending, the United States Court of Appeals for the Fifth Circuit, in *Castano* . . . , decertified a class. . . . Although I was aware of the *Castano* decision as soon as it was released, the petitioners have filed a supplemental brief in which they correctly point out that the underlying facts of this present class suit are remarkably similar to the facts presented in *Castano*."); and *Ex parte Employers Ins. of Wausau*, 590 So.2d 888, 891-92 (Ala. 1991) ("two days before these petitioners were argued before this Court, a district court of appeal of the State of California ruled. . . . We do note that the petitioners, in a supplemental brief filed in this Court subsequent to the California District Court of Appeals' ruling, argue. . . .). In the case at bar, Caremark never even attempted to file a supplemental brief to raise the *Campbell* "double-counting" issue in the 13-month period prior to the Alabama Supreme Court's ruling on the merits of Caremark's appeal.

Third, there is nothing about the *Campbell* opinion that created, for the first time in legal history, this so-called "double-counting" issue. Justice Kennedy's majority opinion in *Campbell* draws upon earlier opinions for the "double-count" quotation from which Caremark derives the catch-phrase for its purported due process issue. The only mention of "double-counting" in the *Campbell* opinion is at 538 U.S. 423, wherein Justice Kennedy quotes Justice Bryer's concurring opinion from *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 593 (1996): "Larger damages might also 'double-count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover."

Caremark simply has no excuse nor explanation for why it did not raise its purported federal due process issue at some point prior to the application for rehearing stage.

II. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Certiorari jurisdiction exists only when a state court "has decided an important federal question." Rule 10(b), Rules of the United States Supreme Court. "To afford the basis for review, the federal question must be substantial." Moore's, *supra*, at ¶512.01, p. 8-73.

Even if the so-called "double-counting" issue might ever have any substance, this case presents a poor vehicle for discussing or applying this issue because the Alabama courts did not address this issue and Caremark did not properly present this issue in state court. As noted in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

The major premise of the Petition is that the entire $1 million compensatory award for fraud must be viewed as

punitive damages because all the compensatory damages in this case are completely subsumed within the approximately $2 million award for breach of contract damages. This premise is unsupported by the record and must be rejected. The jury found, as a fact, that separate, nonduplicative compensatory injury was caused by the fraud [separate from the breach of contract damages]. Caremark did not challenge that finding in any post-trial motion or appellate brief (prior to its application for rehearing).[4]

This Court is powerless to redetermine the state court's findings of fact. By analogy, the finding of fact that destroys Caremark's premise is an adequate and independent state ground to support the judgment. See 20 Charles Alan Wright and Mary Kay Kane, Federal Practice and Procedure Deskbook §114, p. 1065 (2002):

> The most important, and most difficult, limitation on Supreme Court review of state-court decisions has been well stated by Justice Jackson: "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. * * * The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning

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[4] See *Osorio v. K & D Erectors, Inc.*, __ So.2d __, Nos. 2010756 and 2010813, 2003 WL 2007812, *5 (Ala. Civ. App. May 2, 2003) (Application for Rehearing Overruled Sept. 12, 2003): "Also, this court may not hold the trial court in error based on theories or arguments that the appellant did not present to the trial court, or, for that matter, to the appellate court on original submission. *McLemore v. Fleming*, 604 So.2d 353 (Ala. 1992); *Smith v. Equifax Servs., Inc.*, 537 So.2d 463, 465 (Ala. 1988) (our supreme court noted the "long-standing, well established rule that [in order to secure a reversal] the appellant has an affirmative duty of showing error upon the record)."

> of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." [Quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)].

The record in this case does not present the issue that Caremark wishes to be reviewed. Caremark argues now that the $1 million compensatory fraud award is really an additional punitive award (thus, according to Caremark, the ratio of punitive damages is infinite because there is no compensatory award against which to measure the amount of punitive damages).

First, Caremark never [until the rehearing stage] argued that the $1 million compensatory fraud award was not really "compensatory" damages at all. The state court finding of fact – that separate compensatory damages for the fraud do exist – must stand. Caremark never argued that the fraud compensatory damages were duplicative, and Caremark never argued that the amount of punitive damages was unconstitutionally excessive (not until rehearing). Because there *is* a $1 million dollar compensatory award [even ignoring the breach of contract damages], there *is* a compensatory measuring stick, and a one-to-one ratio of punitive to compensatory damages is not even argued to be excessive.

Second, even if the $1 million of fraud compensatory damages are really "punitive," the resulting total of $2 million of punitive damages is not excessive. In performing the mathematical ratio calculation, Caremark conveniently ignores the compensatory breach of contract damages of over $2.2 million. Taking the compensatory contract damages into account, the ratio of punitive damages to compensatory damages is slightly less than one-to-one, even under Caremark's "double-counting" scenario. It would be inconsistent for Caremark to ignore the contract damages because it is Caremark who insists[5] that the fraud compensatory damages are exactly the same category of compensatory damages already awarded for breach of contract. Pages 6-7 of the Petition assert that "the 'fraud' damages were entirely duplicative of the breach of contract damages. . . ."

Third, the facts of this case are truly unique. They are so case-specific, that a review of this case by this Court would not result in any broad rules of law generally applicable throughout the nation to thousands of similar cases. A review of this case would merely be a factual review of one unusual case. This case is not the sort of case that is well-suited to certiorari review by the United States Supreme Court.

Note that p. 5 of the Petition argues for alternative relief: that this case be held, and then remanded, should this Court grant cert again in *Campbell II*. The second petition in *Campbell* has since been denied. *See State Farm*

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[5] See, for examples, the Petition at p. 3, lines 19-22, 33-34; p. 4, lines 18-21; p. 5, lines 24-25; p. 6, final three paragraphs; and p. 7, lines 15-24.

Mut. Auto. Ins. Co. v. Campbell, ___ U.S. ___, No. 04-116, 2004 WL 2074132, 73 USLW 3195 (Oct. 4, 2004) (cert. denied).

CONCLUSION

Respondent Johnston urges the denial of Caremark's petition for writ of certiorari.

Respectfully submitted this 22nd day of October, 2004.

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